

**Rule 11, Ariz. R. Crim. P.**  
**Rule 8, Ariz. R. Crim. P.**

**RESPONSE TO MOTION TO ACCELERATE RULE 11 PROCEEDINGS, RELEASE  
THE DEFENDANT ON HIS OWN RECOGNIZANCE, OR DISMISS FOR RULE 11  
EXAMINATION DELAY**

**When a defendant is held in jail pending Rule 11 examination, the defendant is not entitled to release or dismissal of the charges against him simply because the examinations cannot be performed until after the “last day” under Rule 8, Ariz. R. Crim. P.**

**I. Facts**

[Insert facts, including the charges pending against the defendant and whether he is detained in jail, with the bond amount, if any. State who filed for a Rule 11 prescreening. Explain when the court ordered a full Rule 11 examination, name the experts the court has appointed, and state when the competency hearing is set. Explain when the “last day” for the trial is and that the date set for the competency hearing is after the Rule 8 “last day.”]

The defendant now claims that the foreseeable delay in performing the full Rule 11 examination and holding the competency hearing will violate his right to a speedy trial under Rule 8, Ariz. R. Crim. P. He also asserts that the delay will violate his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 4, 11, and 24 of the Arizona Constitution. The defendant moves to have this Court “dramatically accelerate the Rule 11 schedule in this case.” In the alternative, he asks that this Court release him on his own recognizance pending the conclusion of the Rule 11 proceedings. He also asserts that his due process rights have been violated under *Jackson v. Indiana*, 406 U.S. 715 (1972), because of the foreseeable delay in completing the Rule 11 proceedings, and maintains that dismissal of the charges against him is the appropriate remedy for this constitutional violation.

## **II Law and Argument**

### **A. The defendant's motion is premature because there has not yet been any competency determination.**

The defendant's motion is premature in that there has been no competency determination to date. The most recent order in this case was an order for a full Rule 11 evaluation pursuant to Rule 11.2(d), Ariz. R. Crim. P. Rule 11 does not specify any time limits for examination of the defendant by the mental health experts. Rather, Rule 11.3(c)<sup>1</sup> and Rule 11.4(a)<sup>2</sup> state only that the court shall appoint two or more mental health experts who must report to the court in writing within ten working days after examination of the defendant. The court must then hold a hearing to determine the defendant's competency within thirty days after the experts' reports are submitted to the court pursuant to Rule 11.5(a). To the State's knowledge, the experts have not yet examined the defendant. It follows that none of the time limits prescribed by Rule 11 have been violated. Therefore, this Court should deny the defendant's motion.

The State takes no position concerning the defendant's recommendation to "dramatically accelerate" the Rule 11 proceedings. It is within this Court's discretion to do so. This Court is undoubtedly in the best position to determine whether any acceleration of the proceedings would be feasible, given that the defendant must be

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<sup>1</sup> Rule 11.3(c) states in part: "If the court finds that reasonable grounds for a competency examination exist, the court shall appoint two or more mental health experts from its approved list, at least one of whom must be a psychiatrist, to examine the defendant, report to the court in writing within 10 days after examination of the defendant and, if necessary, testify with regard to the defendant's competence."

<sup>2</sup> Rule 11.4(a) provides in part: "The reports of experts made pursuant to Rule 11.3 shall be submitted to the court within ten working days of the completion of the examination and be made available to all parties."

examined by two mental health experts before a competency determination can be made.

**B. The defendant is not entitled to dismissal of the charges against him under *Jackson v. Indiana* because any commitment order this Court may issue will be definite and limited in extent by statute and rule.**

*Jackson v. Indiana*, 406 U.S. 715 (1972), does not support the defendant's position. In that case, the United States Supreme Court held that *indefinite* confinement of a defendant based solely on his incompetency to stand trial violated both equal protection and due process. The defendant in *Jackson* had been committed to a state hospital for more than three years, and it was highly unlikely that he would ever be competent to stand trial. The Court stated:

We hold ... that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.

*Id.* at 738. Still, the Court recognized that “in light of differing state facilities and procedures,” it was not appropriate for the Court to set “arbitrary time limits” for an incompetent defendant's release. *Id.*

By contrast to the indefinite commitment order found to violate the defendant's due process rights in *Jackson, supra*, if this Court orders the defendant to be committed to ASH for competency restoration treatment, the commitment order will be expressly limited in extent, both by statute and by rule. Under A.R.S. § 13-4512(F), a competency restoration treatment order is valid for 180 days unless terminated sooner, such as when a defendant regains competency or the treating agency reports that there is “no

substantial probability that the defendant will regain competency within twenty-one months after the date of the original finding of incompetency.” Further, A.R.S. § 13-4515(A) states in part, “An order or combination of orders that is issued pursuant to § 13-4512 or 13-4514 shall not be in effect for more than twenty-one months.” Rule 11.5(a)(3), Ariz. R. Crim. P., explains that there is a “15 month limit” for competency restoration treatment, and that term may be extended once for an additional six months if the defendant is making progress towards restoration of competency. Accordingly, any order this Court may make will be limited in extent and cannot be effective for more than twenty-one months.

The Comment to Rule 11.5(b), Ariz. R. Crim. P., states that the Rule was drafted expressly to comply with *Jackson, supra*. The limited time for preconviction commitment orders and the mandatory progress reports from the treating agency to the court act to ensure “a frequent review of each incompetent’s status and progress.” Rule 11.5, Comment. The Arizona statutes and rules thus protect a defendant’s right to due process by prohibiting indefinite commitment orders and setting an outside date for regaining competency. Therefore, the defendant is not entitled to any relief under *Jackson, supra*, or its progeny.

**C. Dismissal of criminal charges is not an appropriate remedy for any delay under *Jackson, supra*.**

In *Jackson, supra*, the United States Supreme Court did not reach the issue of whether charges should be dismissed when an incompetent defendant, who was unlikely to be restored, was detained for an extended period of time. *Jackson*, 406 U.S. at 740. Further, no Arizona case has held that charges should be dismissed unless the defendant is found to be *permanently* incompetent. In *State v. McPherson*, 158 Ariz.

502, 763 P.2d 998 (App. 1988), the trial court committed a defendant for competency treatment at ASH. At a second competency hearing held more than a year after the original commitment order, the court found that the defendant was permanently incompetent and dismissed the charges against him with prejudice. However, finding the defendant to be a danger to others, the trial court ordered that he be committed to ASH for up to six months. The Court of Appeals upheld the trial court's orders. The Court interpreted Rule 11.6(e), Ariz. R. Crim. P., as giving the trial court "discretion to dismiss charges against a defendant found to be incompetent at any time," noting that the Comment to that Rule says that it is intended to give the trial court "the power to dispose of charges at the outset in cases where there is clearly no reason to maintain them (e.g., when the defendant's condition is permanent and he is charged with a comparatively minor offense.)" *McPherson*, 158 Ariz. at 504, 763 P.2d at 1000. The Court said that other grounds might also justify dismissal and that therefore, dismissal is left to the trial court's discretion "subject only to the requirements of reasonableness and accepted legal principles." *Id.* The Court concluded that the trial court did not abuse its discretion in dismissing the charges against the defendant. However, the defendant in *McPherson* actually fit the Comment's example of when dismissal was appropriate – that is, the defendant's condition in *McPherson* was *permanent*. That case says nothing about dismissal of charges against a defendant who may still become competent with court-ordered treatment.

In *State v. Superior Court*, 113 Ariz. 432, 556 P.2d 6 (1976), the Court of Appeals held that a dismissal of charges against a permanently incompetent defendant should be *without* prejudice. In that case, the defendant was charged with aggravated assault

and kidnapping. After a hearing, the trial court found the defendant to be incompetent and ordered him committed to ASH for up to six months. After two more competency hearings, the trial court found that the defendant was still incompetent and unlikely to improve. The court granted the defense's motion to dismiss the charges with prejudice. On special action review, the Court of Appeals held that the dismissal under Rule 11.6(d) should be *without* prejudice, stating:

The purpose of the rule is twofold: that a person charged with a crime, who is committed solely on account of his incapacity to proceed to trial, be held no longer than is necessary to determine whether he will attain that capacity in the foreseeable future; and that such a person whose mental incapacity will continue indefinitely be treated procedurally and substantively the same as persons subject to civil commitment. Neither Rule 11.5 nor Rule 11.6 deal with the merits of the criminal charge.

*Id.* at 433-434, 556 P.2d at 7-8.

In this case, there has not yet been any determination of competency, much less a determination that the defendant is permanently incompetent. It is still possible that this Court will find the defendant competent at the competency hearing. Thus, the case may proceed to trial within a reasonable time. The defendant is being held no longer than necessary to determine his competency, and dismissal is therefore inappropriate. This defendant is not in the same position as those who must be released because they cannot be restored to competency.

The defendant's reliance on civil case law, such as *Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003), is misplaced. In that case, advocates for the mentally ill sued the state hospital for failing to transport pretrial detainees for treatment. The Ninth Circuit upheld an injunction requiring the hospital to admit mentally incapacitated criminal defendants within seven days of a judicial finding of

incapacitation. *Id.* at 1123. While *Mink* may support a *civil* action requiring government officials to provide treatment, it does not support the defendant's motion here seeking dismissal of *criminal* charges. *Mink* simply did not address whether any remedies or sanctions would be appropriate in the underlying criminal cases because the defendants had not been transported promptly.

Courts in other states, although interpreting their specific statutes, have held that due process does not require dismissal of the charges against an incompetent defendant. "Several courts have considered this issue in light of *Jackson*, but none has held that charges against an incompetent accused must be dismissed as a matter of due process." *People v. Zapotocky*, 869 P.2d 1234, 1242 (Colo. 1994).

Though an incompetent defendant who is unlikely to achieve competency in the future may have a constitutional right not to be held in custody based solely on the fact that a Grand Jury has issued an indictment, "such defendant does not have a corollary right to dismissal of the charges, given the public's countervailing interest in the court's continuing jurisdiction over the defendant to monitor the defendant's condition and location." *People v. Schaffer*, 86 N.Y.2d 460, 468-469, 657 N.E.2d 1305, 1310, 634 N.Y.S.2d 22, 27 (1995). The New York court noted that a defendant who has been released under *Jackson*, *supra*, "is not automatically entitled to a dismissal of the charges. The granting of *Jackson* relief per se does not affect the pendency of the indictment." *People v. Schaffer*, *id.* at 468, 657 N.E. 2d at 1310, 634 N.Y.S.2d at 27. *Accord*, *People v. Lewis*, 95 N.Y.2d 539, 548, 742 N.E.2d 601, 606, 720 N.Y.S.2d 87, 92 (2000).

In *State v. Rotherham*, 122 N.M. 246, 264, 923 P.2d 1131, 1149 (1996), the New Mexico Supreme Court discussed the issue of delay of proceedings under *Jackson*, *supra*. In that case, the defendants did not receive hearings on their competency within the time limits prescribed by New Mexico law. They argued that these deadline violations should result in automatic dismissal. The New Mexico Court rejected this argument, stating:

We do not agree that the remedy for delay is automatic dismissal. ... Significantly, the Supreme Court in *Jackson* did not articulate a hard and fast time limitation on commitment to attain competency, requiring only that commitment be for a “reasonable period of time.” We too expect there may be reasonable delays in administration and treatment that would require hearings to be held later than anticipated.

Thus, the New Mexico Supreme Court recognized that “reasonable delays in administration” may delay the process without requiring dismissal. The State asserts that the delay in this case, caused by the schedules of the appointed mental health experts, likewise does not require that the charges against the defendant be dismissed.

**D. No modification of release is warranted at this time pursuant to Rule 7 and A.R.S. § 13-4507.**

A person remaining in custody may move for reexamination of the conditions of release whenever his or her case is transferred to a different court or the motion alleges the existence of material facts not previously presented to the court. Ariz. R. Crim. P. 7.4(b). A.R.S. § 13-4507 also states that the court shall set and may change the conditions under which the competency examination is conducted. The court has not ordered that the defendant be involuntarily confined until the examination is complete. The defendant is currently being held on (fill in amount) bond.



The defendant has not alleged the existence of material facts not previously presented to the court that determined his conditions of release. Therefore, a review of these conditions is not now warranted, and the defendant's motion should be denied.

Moreover, the bail in this case is not excessive. Bail is not excessive merely because the accused cannot give the bail required. *Gusick v. Boies*, 72 Ariz. 233, 237, 233 P.2d 446 (1951). In fact, where the court sets bail within the standards of *Gusick*, only a clearly excessive amount will violate the constitution. *State v. Norcross*, 26 Ariz. App. 115, 117, 546 P.2d 840 (1976). The *Gusick* standards include: the circumstances of each case; the nature and gravity of the offense charged; the character and reputation of the accused; a previous criminal record, if any; the measure of punishment which may be inflicted; and the ability of the accused to give bail, which includes personal pecuniary condition as well as the possession of friends able and willing to give bail for him. *Gusick v. Boies*, 72 Ariz. at 237, 233 P.2d at 450.

In this case, the defendant faces three class 4 felonies, two class 6 felonies, and a class 1 misdemeanor. The defendant committed multiple offenses and the State has alleged that they are in fact multiple offenses pursuant to A.R.S. § 13-702.02. As such, the defendant may face a mandatory prison situation with a presumptive term of 2.5 years. In light of the “measure of punishment” that the defendant potentially faces, the amount of bail is clearly not excessive.

Arizona voters amended Article 2, Section 22 of the Arizona Constitution and gave it effect on November 25, 2002. The amendment directs judicial officers to consider the three purposes for setting bail and release conditions: assuring the appearance of the accused, protecting against the intimidation of witnesses, and protecting the safety of the

victim, any other person, or the community. The purpose of bail is no longer solely to assure the appearance of the accused.

In determining the conditions of release or the amount of bail, the court must consider the constitutional purposes for bail as well as the factors described in A.R.S. § 13-3967(B). These purposes now include the views of the victim; the nature and circumstances of the charged offense(s); the weight of evidence against the accused; the accused's family ties, employment, financial resources, character and mental condition; the results of any drug test submitted to the court; whether the accused is using any illegal substance; the accused's length of residence in the community; the accused's record of arrests and convictions; and the accused's record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

At the time of his arrest, [insert facts supporting bail – such as the defendant's being transient and/or unemployed, whether he has family and/or community ties, whether he resisted arrest, and whether he victimized members of the community.] After considering all of the defendant's circumstances in light of the Arizona Constitution, A.R.S. § 13-3967(B), and the goals of Rule 11, a reduction in bail or release cannot be supported.

### **III. CONCLUSION:**

Dismissal of the charges here would unfairly penalize the State and create additional expense and delay for both parties. The Rule 11 process, which has only just begun, would have to begin anew. The defendant's motion is premature in that there has not been any incompetency determination, and the defendant may be found competent and go to trial on this case. The interests of justice require that the competency evaluation be continued under the current order and that pending charges

not be dismissed. Further, release back into the community might endanger members of the community or the defendant himself, and certainly may hinder the competency evaluation and the goals of Rule 11, Ariz. R. Crim. P.

For all these reasons, the State asks this Court to deny the defendant's motion to dismiss or release.